

# Avoiding Scrutiny? The Margin of Appreciation and Religious Freedom

Stephanie E. Berry

Senior Lecturer in International Human Rights Law, University of Sussex

## 1. Introduction

In the *Kokkinakis* decision, the European Court of Human Rights (ECtHR) accepted that under Article 9 European Convention on Human Rights (ECHR),<sup>1</sup> ‘a certain margin of appreciation is to be left to the Contracting States in assessing the existence and extent of the necessity of an interference’.<sup>2</sup> The margin of appreciation (MoA) is designed to legitimize the ECtHR’s judgments by giving effect to the principle of subsidiarity.<sup>3</sup> However, the ECtHR’s use of the MoA in its freedom of religion or belief jurisprudence has been subject to significant criticism.<sup>4</sup>

This chapter starts from the position that the MoA is a permanent fixture in the ECtHR’s jurisprudence and also serves a legitimate purpose. However, a full review of the ECtHR’s freedom of religion or belief jurisprudence reveals that the manner in which it is employed is often problematic. It is argued that the justifications proffered by the ECtHR to legitimize the award of the MoA are frequently flawed insofar as they are either applied inconsistently or are an inappropriate basis for deference. Furthermore, contrary to the ECtHR’s established position that the ‘margin of

---

<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, C.E.T.S. 005, entered into force 3 September 1953.

<sup>2</sup> *Kokkinakis v. Greece*, 25 May 1993, European Court of Human Rights, No. 14307/88, para 47.

<sup>3</sup> Article 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 213 opened for signature, 24 June 2013, not yet in force.

<sup>4</sup> See, for example, Carolyn Evans, ‘The “Islamic Scarf” in the European Court of Human Rights’, 7 *Melbourne Journal of International Law*, (2006), p. 52; Malcolm D. Evans, ‘Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions’ in Peter Cane, Carolyn Evans and Zoë Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008); Peter Cumper and Tom Lewis, “‘Taking Religion Seriously’? Human Rights and *Hijab* in Europe – Some Problems of Adjudication”, 24 *Journal of Law and Religion*, (2008–2009), p. 599; Stephanie E. Berry, ‘A Tale of Two Instruments: Religious Minorities and the Council of Europe’s Rights Regime’, 30 *Netherlands Quarterly of Human Rights* (2012); Kristin Henrard, ‘How the European Court of Human Rights’ Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion’ 4 *Oxford Journal of Law and Religion* (2015).

appreciation goes hand in hand with a European supervision',<sup>5</sup> in practice, the award of the MoA frequently results in a lack of scrutiny of the necessity of limitations on religious freedom. Thus, although the award of the MoA can be legitimate, its use is often too expansive and damages the protected content of the right to freedom of religion or belief.

This chapter, first, introduces the ECtHR's MoA by elaborating its purpose alongside the key justifications and criticisms of its use. Second, the use of the MoA by the ECtHR in its Article 9 ECHR and Article 2 Protocol 1 jurisprudence is analyzed. The instances where the ECtHR employs the MoA are broadly divided into three categories: deference justified by a lack of consensus; deference in the case of a clash of rights; and deference on the basis that the national authorities are better-placed. While, for the most part, deference on these grounds can be rationalized, in practice the award of the MoA remains problematic.

## **2. The Margin of Appreciation**

The MoA is a judicial construct<sup>6</sup> and despite not finding a basis in the text of the Convention has become well-entrenched in the ECtHR's jurisprudence. Originally adopted in the context of the derogations clause, contained in Article 15 ECHR,<sup>7</sup> the MoA has subsequently been applied in relation to the qualified rights<sup>8</sup> and, more

---

<sup>5</sup> *Metropolitan Church of Bessarabia and Others v. Moldova*, 13 December 2001, European Court of Human Rights, No. 45701/99, para 119; *İzzettin Doğan and others v. Turkey*, 26 April 2016, European Court of Human Rights, No. 62649/10, para 113; *Leyla Şahin v. Turkey*, 10 November 2005, European Court of Human Rights, No. 44774/98, para 110.

<sup>6</sup> Dean Spielmann, 'Whither the Margin of Appreciation' UCL - Current Legal Problems Lecture 20 March 2014, p. 6.

<sup>7</sup> *Greece v United Kingdom*, 2 June 1956, European Commission on Human Rights, No 176/56, para 136; *Lawless v Ireland*, 30 August 1958, European Commission on Human Rights, No 332/57, para 90; *Ireland v United Kingdom*, 18 January 1978, European Court of Human Rights, No 5310/71, para 207.

<sup>8</sup> *The Vagrancy Case (De Wilde, Ooms and Versyp v Belgium)*, 18 June 1971, European Court of Human Rights, No. 2832/66, 2835/66, 2899/66, para 93; *Engel and Others v the Netherlands*, 8 June

recently, ‘all of the substantive articles’.<sup>9</sup> While the ECtHR’s deference to States through the MoA has been subject to consistent criticism, this chapter starts from the position that the MoA is a permanent and irreversible fixture in the ECtHR’s jurisprudence. This view is bolstered by the reference to the MoA in Protocol 15 (not yet in force), which will formalize its existence.<sup>10</sup>

The MoA has been described as the ‘room for manoeuvre’ or discretion afforded to States parties<sup>11</sup> and as a doctrine of underenforcement of convention rights,<sup>12</sup> ‘judicial deference’<sup>13</sup> or ‘self-restraint’.<sup>14</sup> By allowing discretion to States in complex or controversial matters, its use has been lauded for acknowledging the ECtHR’s limitations as an international mechanism of adjudication and, specifically, that national authorities may be better placed to determine the appropriate course of action in a given set of circumstances.<sup>15</sup> The unique position of the ECtHR as an international mechanism that oversees domestic decision-making underpins such deference.<sup>16</sup> Indeed, Spielmann suggests that ‘the MoA is necessary to make interference by an international court with the sovereignty of democratic States

---

1976, European Court of Human Rights, No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para 100; *Handyside v United Kingdom*, 7 December 1976, European Court of Human Rights, No. 5493/72, paras 48-9; *Kokkinakis*, *supra* note 2.

<sup>9</sup> Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’, 65 *International and Comparative Law Quarterly* (2016), p. 23.

<sup>10</sup> Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms CETS 213, Strasbourg 24 June 2013.

<sup>11</sup> Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press 2006), pp. 203–13; Howard C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (London: Martinus Nijhoff Publishers, 1996) p. 192; Jan Kratochvíl, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’, 29 *Netherlands Quarterly of Human Rights* (2011), p. 327.

<sup>12</sup> Dimitrios Tsarapatsanis, ‘The Margin of Appreciation Doctrine: A Low-Level Institutional View’, 35 *Legal Studies* (2015), p. 675.

<sup>13</sup> Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012) p. 27.

<sup>14</sup> McGoldrick, *supra* note 9, p. 22.

<sup>15</sup> Robert Spano, ‘Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity’, 14 *Human Rights Law Review* (2014), p. 499; McGoldrick, *supra* note 9, p. 33.

<sup>16</sup> Andrew Drzemczewski, ‘The *Sui Generis* Nature of the European Convention on Human Rights’ 29 *International and Comparative Law Quarterly* (1980) p. 54.

tolerable and politically acceptable'.<sup>17</sup> Thus, the MoA serves to legitimize the ECtHR's decisions.

However, despite these justifications, the ECtHR's use of the MoA has been subject to intense criticism from both judges within the Court<sup>18</sup> and academics, on the basis that it is applied inconsistently, unevenly and, in some instances, its use is simply superfluous.<sup>19</sup> The apparently *ad hoc* manner<sup>20</sup> in which the MoA is employed has led Brauch to conclude that it is incompatible with the rule of law.<sup>21</sup> Furthermore, the MoA has also been construed as an abrogation of the ECtHR's duties,<sup>22</sup> on the basis that it fails to recognize the deficiencies inherent in democratic processes and has the potential to subject minorities to the tyranny of the majority.<sup>23</sup>

Under Article 9 ECHR and Article 2 Protocol 1 ECHR, States have been permitted a MoA in cases concerning the registration of religious communities,<sup>24</sup> religious clothing,<sup>25</sup> access to religiously compliant food<sup>26</sup> and other materials

---

<sup>17</sup> McGoldrick, *supra* note 9, p. 33.

<sup>18</sup> *Z v. Finland*, 25 February 1997, European Court of Human Rights, No. 22009/93 partly dissenting opinion of Judge De Meyer; *Egeland and Hanseid v Norway*, 16 April 2009, European Court of Human Rights, No. 34438/04 concurring opinion of Judge Rozakis.

<sup>19</sup> See generally, Kratochvíl, *supra* note 11. See also, George Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006), p. 714.

<sup>20</sup> Kratochvíl, *supra* note 11, p. 351.

<sup>21</sup> Jeffrey A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' 11 *Columbia Journal of European Law* (2004-2005) p. 113.

<sup>22</sup> Tsarapatsanis, *supra* note 12, p. 676.

<sup>23</sup> Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards', 31 *New York University Journal of International Law and Policy* (1998-1999), p. 853.

<sup>24</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*, 31 July 2008, European Court of Human Rights, No. 40825/98, para 96; *Magyar Keresztény Mennonita Egyház and others v. Hungary*, 8 April 2014, European Court of Human Rights, No. 70945/11; 23611/12; 26998/12; 41150/12; 41155/12; 41463/12; 41553/12; 54977/12; 56581/12 para 87; *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı v. Turkey*, 2 December 2014, European Court of Human Rights, No. 32093/11, para 47.

<sup>25</sup> *Şahin*, *supra* note 45; *Dahlab v. Switzerland*, 15 February 2001, European Court of Human Rights, No. 42393/98; *Dogru v. France*, 4 December 2008, European Court of Human Rights, No. 27058/05; *Ebrahimian v. France*, 26 November 2015, European Court of Human Rights, No. 64846/11; *SAS v. France*, 1 July 2014, European Court of Human Rights, No. 43835/11; *Eweida and others v. The United Kingdom*, 15 January 2013, European Court of Human Rights, Nos. 48420/10; 36516/10; 51671/10; 59842/10; *Ahmet Arslan and others v. Turkey*, 23 February 2010, European Court of Human Rights, No. 41135/98.

<sup>26</sup> *Cha'are Shalom Ve Tsedek v. France*, 27 June 2000, European Court of Human Rights, No. 27417/95; *Jakóbski v. Poland*, 7 December 2010, European Court of Human Rights, No. 18429/06, para. 47; *Vartic v. Romania (no 2)*, 17 December 2013, European Court of Human Rights, No. 14150/08.

necessary for worship,<sup>27</sup> planning permission for places of worship,<sup>28</sup> proselytism<sup>29</sup> and religious education.<sup>30</sup> While the MoA afforded under Article 9 ECHR originated in the *Kokkinakis* decision<sup>31</sup> the precise justification for deference differs from case to case. Nevertheless, the award of the MoA in the ECtHR's freedom of religion or belief jurisprudence appears, in many of these cases, to be legitimate. However, it is argued here that many of the identified critiques of the MoA are relevant to the ECtHR's religious freedom jurisprudence.

### 3. Lack of Consensus

The consensus doctrine is adopted by the ECtHR in order to determine the width of the MoA left to State parties. The two have an inverse relationship.<sup>32</sup> Thus, if little or no consensus is identified in a particular area, States are permitted a wide MoA, and *vice versa*.<sup>33</sup> Like the MoA, the consensus doctrine is a judicial construct with no basis in the text of the ECHR. It also serves to legitimize the ECtHR's jurisprudence, by rooting interpretations of Convention rights in the practice of State parties. This function is particularly important when the ECtHR adopts evolutive interpretation to expand the scope of Convention rights, by providing 'an objective, measurable interpretive criterion, as opposed to the judge's individual moral preference'.<sup>34</sup> However, in instances where no consensus is observed, the doctrine is used to

---

<sup>27</sup> *Kovaļkovs v Latvia*, 31 January 2012, European Court of Human Rights, No. 5021/05.

<sup>28</sup> *Johannische Kirche & Peters v. Germany*, 10 July 2001, European Court of Human Rights, No. 41754/98.

<sup>29</sup> *Kokkinakis*, *supra* note 2; *Dahlab*, *supra* note 25.

<sup>30</sup> *Folgerø and others v. Norway*, 29 June 2007, European Court of Human Rights, No. 15472/02; *Hasan and Eylem Zengin v. Turkey*, 9 October 2007, European Court of Human Rights, No. 1448/04.

<sup>31</sup> *Kokkinakis*, *supra* note 2.

<sup>32</sup> Benvenisti, *supra* note 23, p. 851.

<sup>33</sup> *Ibid.*

<sup>34</sup> Carmen Draghici, 'The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process' *Public Law* [2017] p. 13.

legitimize a policy of non-intervention by the ECtHR through the award of a wide MoA. Indeed, McGoldrick argues that '[t]he MoA can thus be understood as a device which mediates between the idea of universal human rights and leaving space for reasonable disagreement, legitimate differences, and national or local cultural diversity'.<sup>35</sup>

Nonetheless, deference on the basis of lack of consensus remains problematic. By allowing State practice to determine whether limitations on Convention rights are acceptable, the ECtHR 'reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses'.<sup>36</sup> Specifically, this approach has the potential to allow majorities an unchecked power to limit the rights of minorities and does not observe whether 'hostile-external preferences' are at play.<sup>37</sup> As deference on the basis of a lack of consensus effectively narrows the protected scope of Convention rights, Brauch has criticised the consensus doctrine for undermining both human rights and the rule of law.<sup>38</sup> Further, the ECtHR has been accused of not adopting a consistent methodology when determining the existence of a consensus.<sup>39</sup>

A particular issue in the ECtHR's jurisprudence is identifying the level at which a lack of consensus should be determined: at the abstract level of general principle, or at a concrete level, in relation to the specific issue raised by the case before it.<sup>40</sup> The appropriate level depends on whether the ECtHR is understood to

---

<sup>35</sup> McGoldrick, *supra* note 9, p. 41.

<sup>36</sup> Benvenisti, *supra* note 23, p. 853.

<sup>37</sup> *Ibid.* Letsas, *supra* note 19, p. 729.

<sup>38</sup> Jeffrey A. Brauch, 'The Dangerous Search for a Elusive Consensus: What the Supreme Court *Should* Learn from the European Court of Human Rights' 52 *Howard Law Journal* (2008-09) p. 278.

<sup>39</sup> Henrard, *supra* note 3, p. 416.

<sup>40</sup> Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' *Public Law* [2011] p. 542; Henrard, *supra* note 3, p. 417.

perform a constitutional function or serve the ends of individual justice.<sup>41</sup> This section considers the award of a MoA on the basis of a lack of abstract and concrete consensus, exploring both the legitimacy of the ECtHR's lack of consensus determination and the impact of the MoA in practice.

### ***3.1. Abstract Consensus and the Legitimacy of Deference***

In its freedom of religion or belief jurisprudence, the ECtHR has consistently justified the award of a wide MoA on the basis of a lack of European consensus regarding two abstract concepts: 'the significance of religion in society'<sup>42</sup> and Church-State relations.<sup>43</sup> Rather than being directly relevant to the specific interference with individual religious freedom raised by the case, these abstract concepts relate to the relationship between the State and religion. This section argued that both of these concepts are an inappropriate basis from which to determine the width of a State's MoA.

Despite recognizing in *Kokkinakis* that '[t]he pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it [freedom of religion or belief]',<sup>44</sup> the ECtHR has subsequently questioned 'the significance of religion in society'.<sup>45</sup> By awarding States a wide MoA on this basis, the ECtHR calls into question the foundations of the right to freedom of religion or belief. Namely, that regardless of the State religion or beliefs of the majority

---

<sup>41</sup> For further discussion of the role of the ECtHR see: Kanstantsin Dzehtsiarou and Alan Greene 'Restructuring the European Court of Human Rights: preserving the right of individual petition and promoting constitutionalism' *Public Law* [2013] p. 710.

<sup>42</sup> *Şahin*, *supra* note 5, para.109.

<sup>43</sup> *Cha'are Shalom Ve Tsedek*, *supra* note 26, para. 84; *Şahin*, *ibid*, para. 109; *Sindicatul "Păstorul Cel Bun" v. Romania*, 9 July 2013, European Court of Human Rights, No. 2330/09, para. 138.

<sup>44</sup> *Kokkinakis*, *supra* note 2, para 31.

<sup>45</sup> *Şahin*, *supra* note 5, para 109

population, individual religious freedom is deserving of protection.<sup>46</sup> Indeed, ‘the significance of religion in society’ does not diminish the importance of the right for religious individuals. If human rights seek to protect vulnerable minorities from the tyranny of the majority,<sup>47</sup> then societal priorities must not be used to restrict or narrow individual rights. Any reduction of ‘the significance of religion in society’ increases the importance of article 9 ECHR, rather than providing a basis for narrowing its protected scope. Furthermore, the award of a wide MoA on this basis suggests that Article 9 ECHR is only of concern to those holding religious beliefs. Yet, this overlooks the value of this right to ‘atheists, agnostics, sceptics and the unconcerned’.<sup>48</sup> The award of a MoA on this basis, thus, undermines a good faith interpretation of Article 9 ECHR.

In *Sindicatul “Păstorul Cel Bun”* the ECtHR also noted ‘the wide variety of constitutional models governing relations between States and religious denominations in Europe’.<sup>49</sup> The lack of consensus in relation to Church-State relations has resulted in State being permitted a wide MoA to limit religious freedom. The former President of the ECtHR, Nicholas Bratza has defended this approach on the basis that it allows the ECtHR to ‘strike a balance between, on the one hand, the effective protection of individual rights and, on the other, the need to respect very different constitutional traditions among the Contracting States’.<sup>50</sup> From a pragmatic perspective, the award of a MoA on this basis allows the ECtHR to avoid making unpopular decisions that criticize national traditions.<sup>51</sup> However, a consensus did not exist in relation to

---

<sup>46</sup> Stephanie E. Berry, ‘A “Good Faith” Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and UN Human Rights Committee’, *Legal Studies* (2017) [accessed via Early View] p. 22.

<sup>47</sup> Benvenisti, *supra* note 23, p. 853.

<sup>48</sup> Kokkinakis, *supra* note 2, para 31.

<sup>49</sup> *Sindicatul "Păstorul Cel Bun"*, *supra* note 43.

<sup>50</sup> Nicolas Bratza, ‘The “Precious Asset”: Freedom of Religion Under the European Convention on Human Rights’ (2012) 14 *Ecclesiastical Law Journal* 256, 257-258.

<sup>51</sup> Henrard, *supra* note 3, p. 420.



Church-State relations at the time Article 9 ECHR was adopted. Constitutional traditions and national identity have been used throughout history to justify interference with religious freedom.<sup>52</sup> It is significant that this type of State interference motivated the adoption of the right to religious freedom.<sup>53</sup> Consequently, the award of a wide MoA on this basis is incompatible with a good faith interpretation of Article 9 ECHR.

The two areas in which the ECtHR has identified a lack of abstract consensus are an inappropriate basis for deference, as they are both incompatible with a good faith interpretation of religious freedom. Yet, the use of an abstract consensus in order to determine the width of a State's MoA is not inherently flawed. The identified consensus, or lack thereof, must be compatible with a good faith interpretation of the right. Significantly, the framing of the question will impact whether it is possible to identify a consensus. Thus, while it is not possible to identify a consensus in relation to 'Church-State relations' or 'the significance of religion in society', taken to a further level of abstraction, it is possible to identify an consensus amongst Council of Europe member States in relation to the basic principles upon which constitutional arrangements are required rest. As established in the ECtHR's jurisprudence, the State must act as the 'neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.<sup>54</sup>

The requirements of neutrality and impartiality have underpinned the ECtHR's Article 9 ECHR jurisprudence<sup>55</sup> and have not been questioned by member States, regardless of their constitutional traditions. While the concept of neutrality is not unproblematic—not least because the ECtHR has used it inconsistently in its

---

<sup>52</sup> Statement of Mr Van der Mandele (The Netherlands) at ECOSOC, Record of 215th Meeting held on 25 August 1958 UN doc E/SR.215, p 644.

<sup>53</sup> Berry, *supra* note 46, p. 8

<sup>54</sup> *Şahin*, *supra* note 5, para.107.

<sup>55</sup> *Ibid*; *Metropolitan Church of Bessarabia*, *supra* note 5, para 116; *Dogru* *supra* note 25, para. 106.

jurisprudence—<sup>56</sup> it is a far more satisfactory basis for the determination of whether a consensus exists. In principle, it is compatible with a good faith interpretation of the right to manifest religion, in particular the requirements of State non-interference in matters of conscience and the equal treatment of different beliefs.<sup>57</sup> However, this would result in the adoption of an entirely new approach under Article 9(2) ECHR. Specifically, as a consensus arguably does exist in this respect, it would result in the corresponding narrowing of the MoA.

### ***1.3.2 Concrete Consensus and the Legitimacy of Deference***

The ECtHR has sought to identify a concrete consensus in a number of Article 9 ECHR cases, primarily concerning religious symbols. However, it has also examined whether a concrete consensus exists in cases concerning conscientious objection,<sup>58</sup> and the acceptance of Scientology as a religion.<sup>59</sup> As noted by Henrard, that ‘[t]he appropriate level of concreteness is the one that connects most directly to the central matter of the case’.<sup>60</sup> However, the process used by the ECtHR to determine whether a concrete consensus exists, gives rise to two specific issues, first, what is meant by a consensus, and second, the impact of the framing of the issue on the ECtHR’s determination of whether a consensus exists.

---

<sup>56</sup> See further, Peter Petkoff and Malcolm Evans, Chapter in this collection; Malcolm Evans and Peter Petkoff, ‘A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights’ 36 *Religion, State and Society* (2008) p. 205; Julie Ringelheim, ‘State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights’ Approach’ 6 *Oxford Journal of Law and Religion* (2017), p. 24.

<sup>57</sup> Berry, *supra* note 46, p.10.

<sup>58</sup> *Bayatyan v. Armenia*, 7 July 2011, European Court of Human Rights, No. 23459/03, paras 103, 124.

<sup>59</sup> *Church of Scientology Moscow v. Russia*, 5 April 2007, European Court of Human Rights, No. 18147/02, para. 64; *Kimly and Others v. Russia*, 1 October 2009, European Court of Human Rights, Nos. 76836/01 and 32782/03, para 79.

<sup>60</sup> Henrard, *supra* note 3, p. 417.

The ECtHR has been accused of not adopting a consistent methodology when determining the existence of a consensus under Article 9 ECHR.<sup>61</sup> As a result, consensus in the ECtHR's jurisprudence can refer to unanimity; a percentage or the majority (of States); or a trend in a particular direction.<sup>62</sup> This inconsistency is apparent in the ECtHR's religious symbols jurisprudence, where the level of unanimity required to determine the existence of a consensus varies from case to case.

In *Lautsi*, the ECtHR determined that no consensus existed amongst Council of Europe member States in relation to the compulsory presence of a crucifix in classrooms in Italy. Specifically, the ECtHR identified a wide range of practices with some States prohibiting the presence of such symbols, some requiring the presence of such symbols and many States simply not having legislated on the matter.<sup>63</sup> In contrast, in *Şahin* the ECtHR carried out a detailed examination of the restriction of the *hijab* in educational institutions in Europe.<sup>64</sup> The comparative analysis revealed that only France, in addition to Turkey, had legislated to impose a blanket ban on religious clothing in State-funded educational institutions. However, as other States allowed schools discretion to decide whether religious clothing was permitted, the ECtHR determined that no consensus existed.<sup>65</sup> In *SAS*, concerning the ban on the covering of the face in public, the consensus was even more overwhelming, with only Belgium having adopted an analogous law.<sup>66</sup> Yet, the ECtHR determined that no consensus existed,<sup>67</sup> suggesting that complete unanimity is required for a concrete consensus to be identified by the ECtHR.

---

<sup>61</sup> Ibid, p. 416.

<sup>62</sup> Dzehtsiarou, *supra* note 40, pp. 541-42.

<sup>63</sup> *Lautsi and others v. Italy*, 18 March 2011, European Court of Human Rights, No. 30814/06, paras 26-28, 70.

<sup>64</sup> *Şahin*, *supra* note 5, paras 55-65.

<sup>65</sup> Ibid., para 109.

<sup>66</sup> *SAS v. France*, *supra* note 25, para 40.

<sup>67</sup> Ibid., para 156.

However, a less onerous consensus test was imposed in *Eweida*, where the ECtHR found that ‘in the majority of States the wearing of religious clothing and/or religious symbols in the workplace is unregulated’, despite finding evidence of the practice being regulated in ten States.<sup>68</sup> Despite affirming the presence of a consensus regarding the regulation of religious symbols in the workplace, in *Ebrahimian*, the ECtHR went on to justify the award of a wide MoA on the basis of the lack of abstract consensus regarding Church-State relations.<sup>69</sup>

The apparently inconsistent manner in which the ECtHR has identified the existence of a concrete consensus is problematic from the perspective of legal certainty and the rule of law.<sup>70</sup> Nonetheless, there have been some attempts to explain this discrepancy, most notably in relation to *SAS*.<sup>71</sup> McGoldrick has, for example, suggested that the consensus doctrine allows ‘States to impose new restrictions on rights and these may fall within the MoA even if other States have not imposed them’.<sup>72</sup> Draghici has, furthermore, argued that the identification of consensus amongst all Council of member States in this scenario is inappropriate, as ‘unresponsiveness to non-existent problems has no evidentiary value. In fact, the consensus doctrine measures attitudes and legal solutions adopted in respect of similar socio-political dilemmas’.<sup>73</sup> Yet, these justifications are insufficient to justify the inconsistencies in the ECtHR’s Article 9 ECHR jurisprudence. In *SAS*, even if only similar States were surveyed by the ECtHR, then an overwhelming consensus was still apparent.<sup>74</sup> This would also have excluded States such as Latvia, which have subsequently gone on to

---

<sup>68</sup> *Eweida*, *supra* note 25, para 47.

<sup>69</sup> *Ebrahimian*, *supra* note 25, para. 65.

<sup>70</sup> Brauch, *supra* note 38, p. 278, 290.

<sup>71</sup> McGoldrick, *supra* note 9, p. 29; Draghici, *supra* note 34, p. 18.

<sup>72</sup> McGoldrick, *ibid*, p 29.

<sup>73</sup> Draghici, *supra* note 34, p. 18.

<sup>74</sup> *SAS*, *supra* note 25, partially dissenting opinion of Judges Nussberger and Jäderblom, para 19.

adopt a so-called ‘*burqa* ban’.<sup>75</sup> Further, the award of a wide MoA on the basis of an emerging trend or societal development, has the potential to legitimize growing intolerance and fails to protect minorities from the tyranny of the majority. Indeed, the ECtHR noted the Islamophobic tone of the debate that preceded the adoption of the French ‘*burqa* ban’.<sup>76</sup> The ECtHR cannot simply defer to States if it is to act as a check on State power.

The framing of the issue is also central to whether the ECtHR is able to identify whether a concrete consensus exists. In *Şahin*, the ECtHR, in part, based the award of a wide MoA on the lack of consensus amongst Council of Europe member States in relation ‘to regulating the wearing of religious symbols in educational institutions’.<sup>77</sup> However, this conclusion was reached by comparing State practice in relation to educational institutions, in general, rather than universities, in particular. As noted by Judge Tulkens ‘in none of the member States has the ban on wearing religious symbols extended to university education, which is intended for young adults, who are less amenable to pressure’.<sup>78</sup> Notably, in *Dahlab*, the age and vulnerability of the pupils had been central to the ECtHR’s acceptance that Switzerland had a MoA to restrict the religious freedom of teachers.<sup>79</sup> Thus, while the ECtHR in *Şahin* considered whether a concrete consensus existed in relation to the issue raised by the case, the framing of the issue influenced the outcome of its comparative analysis.

---

<sup>75</sup> For example, Rachael Pells, *Islamic face veil to be banned in Latvia despite being worn by just three women*, 21 April 2016, The Independent, <[www.independent.co.uk/news/islamic-muslim-face-veil-niqab-burqa-banned-latvia-despite-being-worn-by-just-three-women-entire-a6993991.html](http://www.independent.co.uk/news/islamic-muslim-face-veil-niqab-burqa-banned-latvia-despite-being-worn-by-just-three-women-entire-a6993991.html)>, 29 September 2017.

<sup>76</sup> *SAS*, *supra* note 25, para 149.

<sup>77</sup> *Şahin*, *supra* note 5, para 109.

<sup>78</sup> *Ibid.*, Judge Tulkens dissenting opinion para 3.

<sup>79</sup> *Dahlab*, *supra* note 25.

The inconsistent approach adopted by the ECtHR when determining if a concrete consensus exists has the potential to delegitimize its jurisprudence. Indeed, the approach adopted leads to the conclusion that rather than seeking to protect the rights of vulnerable minorities, ‘the Court’s use of the European consensus factor enables it to avoid taking a stance on (often controversial) matters that are closely intertwined with deeply held national constitutional values and the related national constitutional identity’.<sup>80</sup>

### ***3.2. The Impact of Deference on the Basis of a Lack of Consensus***

A lack of abstract consensus is often used to award States a wide MoA to restrict individual religious freedom in cases where the interference with individual religious freedom seeks to uphold or protect constitutional traditions or concerns the relationship between the State and religious communities. Thus, the impact of the MoA in these instances warrants further exploration. In contrast, a lack of concrete consensus is primarily used to bolster another justification for the award of a MoA and, thus, is not discussed in detail here.<sup>81</sup>

#### **3.2.1. Constitutional Traditions**

Constitutional traditions have successfully been invoked in order to justify the limitation of individual rights under Article 9 ECHR and Article 2 Protocol 1. Specifically, under the MoA, the ECtHR has deferred to States on the basis of both secular<sup>82</sup> and Christian traditions.<sup>83</sup> Deference on this basis is not absolute. Although

---

<sup>80</sup> Henrard, *supra* note 3, p. 414.

<sup>81</sup> Şahin, *supra* note 5; SAS, *supra* note 25.

<sup>82</sup> Şahin, *ibid*; Dahlab, *supra* note 25; Dogru *supra* note 25; Ebrahimian, *supra* note 25.

<sup>83</sup> Folgerø, *supra* note 30; Lautsi, *supra* note 63.

States have a wide MoA, the ECtHR has emphasised that this must be consistent with the role of the State as the ‘neutral and impartial organiser of the exercise of various religions, faiths and beliefs’.<sup>84</sup> Notably, the width of the MoA available to States appears to differ according to which tradition is invoked.

In the context of cases concerning religious clothing, the ECtHR has accepted that restrictions on religious clothing in State institutions, underpinned by the pursuit of the constitutional tradition of secularism, fall within the State’s MoA.<sup>85</sup> The width of the MoA in these cases is bolstered by the purported lack of concrete consensus in relation to religious clothing in State institutions.<sup>86</sup> Despite consistently reiterating that ‘[t]his margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it’,<sup>87</sup> the ECtHR often avoids scrutinizing whether the interference with Article 9 ECHR was necessary in a democratic society, as required by Article 9(2) ECHR.<sup>88</sup> Specifically, Carolyn Evans has noted that ‘[i]n the headscarf cases, the Court ... does not question the elevated position of secularism’.<sup>89</sup> Indeed, in *Dogru*, the ECtHR indicated that secularism is to be prioritized above individual religious freedom.<sup>90</sup> This approach is underpinned by the ECtHR’s acceptance that secularism is ‘consistent with the values underpinning the Convention’.<sup>91</sup>

The lack of scrutiny of the necessity of restrictions on individual religious freedom in cases concerning secularism can be attributed to two presumptions made

---

<sup>84</sup> *Şahin*, *supra* note 5, para.107.

<sup>85</sup> Berry, *supra* note 46. See further, Jeremy Gunn, Chapter 6.

<sup>86</sup> *Şahin*, *supra* note 5, para. 40.

<sup>87</sup> *Metropolitan Church of Bessarabia and Others*, *supra* note 5, para 119; *Doğan* *supra* note 5, para 113; *Şahin*, *supra* note 5, para 110.

<sup>88</sup> See for example, *Jasvir Singh v France*, 30 June 2009, European Court of Human Rights, No. 25463/08; *Ranjit Singh v France*, 30 June 2009, European Court of Human Rights, No. 27561/08.

<sup>89</sup> Carolyn Evans, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’ 26 *Journal of Law and Religion* (2010-2011), p. 336.

<sup>90</sup> *Dogru* *supra* note 25, para. 72.

<sup>91</sup> *Şahin*, *supra* note 5, para 114.

by the ECtHR. First, the ECtHR has predetermined that secular constitutional traditions are compatible with the role of the State as the ‘neutral and impartial organiser’.<sup>92</sup> Second, the ECtHR presumes that secularism seeks to uphold the religious freedom of all members of society and, therefore, any limitation on this basis falls within the ground of ‘the protection of the rights and freedoms of others’.<sup>93</sup> However, both of these presumptions are flawed. Secularism is not a monolith, and in some interpretations is actively hostile to religion.<sup>94</sup> Hostile secularism is primarily concerned with eliminating religion from the public sphere, rather than the protection of individual freedoms.<sup>95</sup> Consequently, secularism cannot be presumed to be neutral and impartial nor is it necessarily concerned with upholding individual religious freedom.<sup>96</sup> Thus, the ECtHR should exercise a higher level of scrutiny of the necessity of limitations underpinned by secularism.

In direct contrast, the MoA afforded to States on the basis of Christian traditions appears to be narrower, as the ECtHR has explicitly scrutinized whether the interference with the applicant’s rights complies with the requirements of neutrality and impartiality. In *Folgerø*, the ECtHR was willing to accept that the prioritization of Christianity within the religious education syllabus fell within the State’s MoA ‘[i]n view of the place occupied by Christianity in the national history and tradition of the respondent State’.<sup>97</sup> Similarly, in *Lautsi*, the Grand Chamber held that ‘the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State’.<sup>98</sup> However, in *Lautsi*, the Grand Chamber also

---

<sup>92</sup> *Ibid.*

<sup>93</sup> McGoldrick, *supra* note 9, p. 52.

<sup>94</sup> Rex Adhar, ‘Is Secularism Neutral?’ 25 *Ratio Juris* (2013) p. 411.

<sup>95</sup> Russell Sandberg and Norman Doe, ‘Church-state relations in Europe’ 1 *Religion Compass* (2007) p. 565.

<sup>96</sup> Berry, *supra* note 46, pp. 16-7.

<sup>97</sup> *Folgerø*, *supra* note 30, para. 89.

<sup>98</sup> *Lautsi* *supra* note 63, para. 68.



observed that ‘that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.’<sup>99</sup> Rather than accepting that restrictions are *prima facie* legitimate, as it did in the secularism cases, the ECtHR considered whether the State had struck an appropriate balance. In *Folgerø*, despite the State’s MoA, the ECtHR carried out a detailed analysis of the religious education syllabus and concluded that it was incompatible with the State’s role as a ‘neutral and impartial organiser’.<sup>100</sup> Thus, while a wide MoA is permitted on the basis of the Christian traditions of the State, underpinned by the lack of consensus in this area, the ECtHR does not take for granted that limitations are neutral and impartial.

Notably, in *Zengin*, which is analogous to *Folgerø*, the ECtHR did not recognize that the State had a MoA concerning Islamic traditions.<sup>101</sup> As the ECtHR carried out a similar level of analysis in *Zengin* as in *Følgero*, this suggests that the reference to the MoA in *Følgero* was unnecessary.<sup>102</sup> The ECtHR could simply consider whether the interference with religious freedom was justifiable under the limitations clause.<sup>103</sup> Moreover, it also suggests that the scope of the MoA permitted on the basis of national traditions is contingent upon the extent to which those traditions are perceived by the ECtHR to be consistent with the role of the State as ‘the neutral and impartial organiser’ and the values underpinning the Convention. The ECtHR has found Islam to be incompatible with both.<sup>104</sup> Thus, while the ECtHR is

---

<sup>99</sup> *Ibid.*

<sup>100</sup> *Folgerø*, *supra* note 30, paras. 95-100.

<sup>101</sup> *Zengin*, *supra* note 30.

<sup>102</sup> Henrard, *supra* note 3, p. 409.

<sup>103</sup> See further, T. Jeremy Gunn, ‘Deconstructing Proportionality in Limitations Analysis’ 19 *Emory International Law Review* (2005) p. 487, for an exploration of the similarity of proportionality analysis and the MoA.

<sup>104</sup> *Refah Partısı (The Welfare Party) and others v. Turkey*, 13 February 2003, European Court of Human Rights, Nos. 41340/98; 41342/98; 41343/98, 41344/98, paras. 123 and 128.

willing to afford a MoA on the basis of secular and Christian traditions, it seems unlikely that this will be extended to Islamic traditions.

In practice, the ECtHR uses the lack of consensus in relation to Church-State relations to avoid scrutinizing the necessity of limitations on the right to manifest religion in cases where the constitutional tradition of secularism is invoked. In contrast, it does scrutinize the necessity of limitations in cases involving Christian traditions. The apparent discrepancy between the treatment of different traditions can be rationalized on the basis that secular tradition are presumed by the ECtHR to be consistent with the requirements of neutrality and impartiality. Given that this is based on a mistaken presumption, the ECtHR should exert a higher level of scrutiny in these cases.

### 3.2.2. The Relationship between the State and Religious Communities

On the basis of the ‘wide variety of constitutional models governing relations between the State and religious groups’, the ECtHR has accepted that States have a MoA ‘where questions concerning the relationship between State and religions are at stake’.<sup>105</sup> States are also permitted a MoA to determine the appropriate constitutional model ‘to reconcile the interests of the various religions and religious groups that coexist in a democratic society’.<sup>106</sup> As with the cases concerning constitutional traditions, the MoA is subject to the requirement that the State act in a neutral and impartial manner. However, in practice, the limits of this MoA are more clearly defined, as the ECtHR frequently scrutinizes whether the interference with Article 9 ECHR is underpinned by arbitrary or discriminatory justifications under Article 14

---

<sup>105</sup> *Doğan*, *supra* note 5, para 113.

<sup>106</sup> *Kokkinakis*, *supra* note 2, para. 33; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Iokentiy) and others v Bulgaria*, 16 September 2010, European Court of Human Rights, No 412/03, 35677/04, para 119.

ECHR. For example, while the ECtHR has recognized that States are permitted to require the registration of religious communities and organisations,<sup>107</sup> it has also recognized that denial or removal of official status may render the right to freedom of religion or belief illusory.<sup>108</sup> Consequently, ‘in the absence of relevant and sufficient reasons’ to justify the denial, the ECtHR has determined that the State has overstepped its MoA.<sup>109</sup> Specifically, States have overstepped their MoA if they deny official status on arbitrary or discriminatory grounds.<sup>110</sup>

While religious communities can be required to register, the failure to obtain an official status does not permit the State to interfere with the individual exercise of the right to manifest religion. Consequently, in both *Manoussakis* and *Masaev*, the State had overstepped its MoA by prosecuting individuals for practicing an unregistered religion.<sup>111</sup> The denial of the right to conscientious objection from civilian service in *Lang and Löffelmann*, also fell outside the State’s MoA, as the Jehovah’s Witnesses had been discriminatorily denied a status that would allowed their members to exercise this right.<sup>112</sup>

In addition to the formal regulation of religions by the State, the lack of consensus ‘with regard to establishment of the delicate relations between the Churches and the State’,<sup>113</sup> was used in *Cha’are Shalom Ve Tsedek* to justify the

---

<sup>107</sup> *Relionsgemeinschaft der Zeugen Jehovas*, *supra* note 24, para 96; *Magyar Keresztény Mennonita Egyház*, *supra* note 24, para 87; *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı*, *supra* note 24, para 47.

<sup>108</sup> *Doğan*, *supra* note 5, para 136; *Magyar Keresztény Mennonita Egyház*, *ibid*, para 88.

<sup>109</sup> *Doğan*, *ibid*, para 135.

<sup>110</sup> *Relionsgemeinschaft der Zeugen Jehovas*, *supra* note 24, para 98; *Svyato-Mykhaylivska Parafiya v. Ukraine*, 14 June 2007, European Court of Human Rights, 77703/01, para 152; *Doğan*, *ibid*, paras 184-85; *Magyar Keresztény Mennonita Egyház*, *supra* note 24, para, 115; *Cumhuriyetçi Eğitim Ve Kültür Merkezi Vakfı*, *supra* note 24, para. 50.

<sup>111</sup> *Masaev v. Moldova*, 12 May 2009, European Court of Human Rights, No. 6303/05, para 26; *Manoussakis and others v Greece*, 26 September 1996, European Court of Human Rights, No. 18748/91 para 52.

<sup>112</sup> *Lang v. Austria*, 19 March 2009, European Court of Human Rights, No. 28648/03; *Löffelmann v. Austria*, 12 March 2009, European Court of Human Rights, No. 42967/98. Cf. *Koppi v Austria*, 10 December 2012, European Court of Human Rights no. 33001/03; *Bayatyan*, *supra* note 58, paras 123-125.

<sup>113</sup> *Cha’are Shalom Ve Tsedek*, *supra* note 26, para. 84.

award of a MoA to regulate *kosher* slaughter. State regulation in this respect is not directly analogous to the registration of religion and, in fact, the award of a MoA here suggests that States can use the lack of consensus in relation to Church-State relations to justify almost any interference with religious freedom. Nonetheless, the award of the MoA appears to be superfluous as the ECtHR scrutinized whether the interference with the applicant's right pursued a legitimate ground of limitation and whether alternative *kosher* meat was available under article 9(2) ECHR.

Moreover, despite accepting that States have a MoA 'to reconcile the interests of the various religions and religious groups that coexist in a democratic society',<sup>114</sup> this has not stopped the ECtHR from scrutinizing the legitimacy of State interference in order to resolve internal religious disputes. In *Supreme Holy Council of Muslim Community* and *Holy Synod of the Bulgarian Orthodox Church*, the State had sought to resolve intra-religious leadership disputes. The ECtHR found that Bulgaria had overstepped its MoA on the basis that '[t]he role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.<sup>115</sup> The requirements of impartiality and neutrality appear to underpin the ECtHR's decision. However, reference to the State's MoA in this case is unnecessary as the ECtHR reached a similar decision in the analogous case of *Hasan and Chaush* by scrutinizing the necessity of the interference under Article 9(2) ECHR without reference to the MoA.<sup>116</sup>

Although the ECtHR has recognized that States have a wide MoA to determine their relationship with religious communities, this MoA is not unlimited.

---

<sup>114</sup> *Kokkinakis*, *supra* note 2, para. 33; *Holy Synod of the Bulgarian Orthodox Church*, *supra* note 106.

<sup>115</sup> *Supreme Holy Council of the Muslim Community v. Bulgaria*, 16 December 2004, European Court of Human Rights, No. 39023/97 para. 96; *Holy Synod of the Bulgarian Orthodox Church*, *ibid*, para. 120.

<sup>116</sup> *Hasan and Chaush v. Bulgaria*, 26 October 2000, European Court of Human Rights, No. 30985/96.

The ECtHR has consistently examined whether restrictions on religious freedom comply with the requirements of impartiality and neutrality under both Articles 9 and 14 ECHR. Furthermore, the ECtHR has scrutinized whether restrictions are necessary in a democratic society or justifiable by reference to grounds set out in the limitations clause. Consequently, it appears that the deference afforded to the State in these cases does not extend significantly past Article 9(2) ECHR.

#### **4. Reconciling a Clash between Individual Religious Freedom and ‘the Rights and Freedoms of Others’ or Other Societal Goals**

The ECtHR has accepted that States have a MoA to strike a fair balance ‘between the competing interests of the individual and of the community as a whole’.<sup>117</sup> Thus, ‘various concessions on the part of individuals or groups’ may be necessary ‘to maintain and promote the ideals and values of a democratic society’.<sup>118</sup> The MoA in this context permits States to determine the appropriate weight to be afforded to competing interests. As Article 9(2) ECHR already allows States to interfere with the right to manifest religion in order to protect ‘the rights and freedoms of others’, alongside ‘community interests’ such as ‘public safety’, ‘public order’ and ‘health and morals’ it is not clear what the MoA adds in this respect. Nonetheless, a degree of discretion appears to be appropriate as there will rarely be a *right* answer, in instances that disclose a clash of rights. Yet, there have been two main criticisms of the ECtHR’s use of the MoA in these cases: first, the wide interpretation of the permissible grounds of limitation, in particular, ‘the rights and freedoms of others’ and, second, the failure of the ECtHR to consider whether the case discloses a

---

<sup>117</sup> *Eweida*, *supra* note 25, para. 84.

<sup>118</sup> *Şahin*, *supra* note 5, para.108.

genuine clash of rights.<sup>119</sup> Both of these criticisms are underpinned by a lack of scrutiny of the State's position.

The text of Article 9(2) ECHR clearly establishes that restrictions on the right to manifest religion in order to protect 'the rights and freedoms of others' are legitimate, provided such limitations are evidenced to be necessary in a democratic society. As noted by this author elsewhere, 'the ground of "the protection of the rights and freedoms of others" was ... intended to prevent religious manifestation from infringing the concrete rights of individuals, elaborated in human rights instruments'.<sup>120</sup> However, in practice, the ECtHR has interpreted this ground widely, under Articles 8-11 ECHR, to include contractual rights, commercial interests, socio-economic interests and social policy in addition to 'the rights and freedoms' contained in the ECHR.<sup>121</sup> Thus, in *SAS*, the ECtHR allowed France a wide MoA to pursue the aim of 'living together' under 'the rights and freedom of others'.<sup>122</sup> It is clear that this expands the scope of this ground beyond its original meaning, as the judges had to clarify this point during the oral hearing.<sup>123</sup> Despite recognizing that 'the flexibility of the notion of "living together" and the resulting risk of abuse',<sup>124</sup> the ECtHR still allowed France discretion to interpret the grounds of limitation broadly. If the ECtHR permits the States a MoA to interpret the scope of permissible grounds of limitation

---

<sup>119</sup> Jacco Bornhoff, "'The Rights and Freedoms of Others': The ECHR and its Peculiar Category of Conflicts between Individual Fundamental Rights" in Eva Brems (ed), *Conflicts Between Fundamental Rights* (Antwerp/Oxford: Intersentia, 2008) accessed via SSRN; Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others' 3 *Oxford Journal of Law and Religion* (2014) p. 2; Ian Leigh, 'Reversibility, proportionality, and conflicting rights: *Fernández Martínez v. Spain*' in Stijn Smet and Eva Brems (eds.) *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony* (Oxford: Oxford University Press, 2017) accessed via Durham Research Online.

<sup>120</sup> Berry, *supra* note 46, p. 5.

<sup>121</sup> Bornhoff, *supra* note 119, p. 5-6.

<sup>122</sup> *SAS*, *supra* note 25, paras. 153-55. *Konrad v. Germany*, 11 September 2006, European Court of Human Rights, No. 35504/03; *Osmanoğlu and Kocabaş v. Switzerland*, 10 January 2017, European Court of Human Rights, No. 29086/12 para. 105.

<sup>123</sup> *SAS v France*, Oral Hearing, <[www.echr.coe.int/Pages/home.aspx?language=en&p=hearings&w=4383511\\_27112013](http://www.echr.coe.int/Pages/home.aspx?language=en&p=hearings&w=4383511_27112013)> 11 September 2017. See further, Berry, *supra* note 46, p. 6.

<sup>124</sup> *SAS*, *supra* note 25, para 122.

and a MoA to determine the appropriate balance to be struck between competing interests, as it did in *SAS*, this has the potential to result in a complete lack of scrutiny of the interference with religious freedom.

The wide interpretation of grounds of limitation does not necessarily result in a lack of scrutiny. Notably, in *Eweida*, the ECtHR considered whether the State had struck the correct balance by prioritizing ‘the employer’s wish to project a certain corporate image’ above the applicant’s right to manifest religion by wearing a crucifix.<sup>125</sup> The ECtHR interpreted the grounds of limitation broadly and accepted that the ‘wish to project a certain corporate image’ fell within ‘the rights and freedoms of others’. Yet, despite the recognized MoA afforded to national courts to determine the proportionality of restrictions in the case of clashing rights,<sup>126</sup> the ECtHR still concluded that ‘the domestic courts accorded it [the employer’s corporate image] too much weight’.<sup>127</sup> Thus, the ECtHR scrutinized the necessity of the limitation and prioritized Convention rights above other interests when considering the proportionality of interferences with Article 9 ECHR. This suggests that the level of scrutiny depends on the nature of ‘the rights and freedom of others’ being used to justify an interference with a Convention right. Commercial interests may be afforded less priority than societal interests, such as integration policies, where the State is considered to be better-placed to make a decision.<sup>128</sup>

A wide MoA has been awarded to States to reconcile a clash between Convention rights, in cases concerning freedom of religion or belief on the one hand, and LGBT rights,<sup>129</sup> gender equality,<sup>130</sup> or the religious freedom of others<sup>131</sup> on the

---

<sup>125</sup> *Eweida*, *supra* note 25, para. 94.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> See further section 5.

<sup>129</sup> *Ibid.*, paras. 106, 109.

<sup>130</sup> *Dahlab*, *supra* note 25; *Şahin*, *supra* note 5, para. 115.

other. The limitation of Article 9 ECHR on this basis aligns with a good faith interpretation of the ground of ‘the rights and freedoms of others’ and the award of a MoA to the State in such difficult cases does not appear to be inappropriate. However, as the MoA often leads the ECtHR to accept the position of the State without scrutiny, it often fails to consider *if* the alleged clash actually exists.<sup>132</sup> In order to ascertain whether a genuine clash of rights exists, Leigh advocates for the application of the ‘reversibility test’: ‘the reversibility test requires the Court to ask whether another identifiable victim would have an admissible Convention claim if the state were to “reverse” the outcome by giving priority to the less favoured right’.<sup>133</sup> This provides a useful basis from which to analyze the impact of the MoA in cases concerning an alleged clash of rights.

In the *Ladele* case, the ECtHR accepted that the religious freedom of a registrar who refused to officiate civil partnerships on religious grounds, should give way to the rights of the LGBT community not to be discriminated against.<sup>134</sup> Leigh and Hambler argue that although the interference with Ladele’s rights pursued equality for the LGBT community, at this time the provision of same-sex civil partnerships was not recognized to be a right under the ECHR.<sup>135</sup> Thus, if the ‘reversibility test’ were applied, there would be no identifiable victim of a rights violation.<sup>136</sup> In practice, once a State has identified a clashing Convention right, the ECtHR does not appear to analyze whether a genuine clash exists. This approach has the potential to permit States unchecked discretion to restrict Article 9(1) ECHR. The MoA should not result

---

<sup>131</sup> *Ibid.*

<sup>132</sup> Ian Leigh, ‘Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack’ 17 *Res Publica* (2011) p. 55.

<sup>133</sup> Leigh, *supra* note 119, p. 23-4.

<sup>134</sup> *Eweida*, *supra* note 25.

<sup>135</sup> Leigh and Hambler, *supra* note 119, pp. 15-19.

<sup>136</sup> *Ibid.*, p. 16



in blind deference, specifically, where rights or interests are not of equivalent standing the principle of ‘priority of rights’<sup>137</sup> should prevail.

The ECtHR has also recognized that States have a particularly wide MoA to pursue gender equality under Article 9(2) ECHR on the basis that it is ‘one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe’.<sup>138</sup> Whilst this appears to be a legitimate justification for the restriction of Article 9 ECHR, the uncritical approach of the ECtHR is problematic. In the Islamic headscarf cases, the ECtHR has taken at face value the States’ assertion that restrictions on the headscarf are necessary to protect gender equality.<sup>139</sup> By accepting this aim as legitimate, without scrutinizing the necessity of the interference, the ECtHR reverses the burden of proof and places the onus on the applicant to evidence that the *hijab* is compatible with gender equality. In practice, only when third party interveners provided evidence that contradicted this position in *SAS*,<sup>140</sup> did the ECtHR question the ‘gender equality’ argument.<sup>141</sup> The ECtHR’s automatic acceptance of the State’s position places the applicant at a disadvantage and means that the ECtHR does not consider if a genuine clash of rights exists.

The ECtHR has also accepted that it is necessary to restrict the manifestation of religion in to protect the religious freedom of others in cases of ‘improper pressure’ through proselytism. Although States have a MoA to strike the appropriate balance in this respect, in the *Kokkinakis* case, the ECtHR established that the State’s MoA in cases concerning Christian witness as opposed to ‘improper evangelism’ is not

---

<sup>137</sup> *Belgian Linguistics Case*, 23 July 1968, European Court of Human Rights, No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, pp. 280-81.

<sup>138</sup> *Şahin*, *supra* note 5.

<sup>139</sup> Bornhoff, *supra* note 119, p. 6.

<sup>140</sup> *SAS*, *supra* note 25, paras 94-98, 104.

<sup>141</sup> *Ibid*, paras 118-19.

unlimited and is subject to scrutiny.<sup>142</sup> The ECtHR's reasoning in the *Larissis* case suggests that while proselytism in a personal capacity does not violate the religious freedom of others, the right to proselytise can be restricted if there is potential abuse of power.<sup>143</sup> Notably, in *Larissis*, the ECtHR did not make reference to the State's MoA and, rather, analyzed the proportionality of the restriction on individual religious freedom. This, yet again, suggests that reference to the MoA in *Kokkinakis* was superfluous as the ECtHR is able to identify whether the correct balance has been struck between competing rights by using the limitations clause.

However, the ECtHR's jurisprudence in this area is somewhat complicated by its acceptance that 'the wearing of a headscarf might have some kind of proselytising effect'.<sup>144</sup> In contrast to the *Kokkinakis* and *Larissis*, in these cases the ECtHR does not require that the applicant hold a position of power or influence<sup>145</sup> or even have an intention to proselytise.<sup>146</sup> Notably, in both the *Şahin* and *Dogru* cases, the ECtHR did not find any evidence that the individual applicants had sought to proselytise<sup>147</sup> but instead had found that by merely wearing a religious symbol in a State institution, they had the potential to exert improper pressure on others.<sup>148</sup> This inconsistency with the ECtHR's earlier proselytism jurisprudence can be attributed to the lack of scrutiny of the legitimacy of the State's position. Indeed, were the 'reversibility test' applied to the headscarf cases, it is clear that there is not a genuine clash of rights. The presence of religious symbols in State institutions does not violate the religious freedom of

---

<sup>142</sup> *Kokkinakis*, *supra* note 2, para. 48.

<sup>143</sup> *Larissis and others v. Greece*, 20 February 1998, European Court of Human Rights, No. 23372, paras. 54-55.

<sup>25</sup> *Dahlab*, *supra* note 25.

<sup>145</sup> *Şahin*, *supra* note 5, para. 115; *Dogru* *supra* note 25, para. 64.

<sup>146</sup> *Şahin*, *ibid.*, Dissenting Opinion of Judge Tulkens, para. 8; *Ebrahimian*, *supra* note 25, para. 71. Cf. *Arslan*, *supra* note 25, para. 51.

<sup>147</sup> *Şahin*, *supra* note 5, Dissenting opinion of Judge Tulkens para 8. *Dogru* *supra* note 25, para 44.

<sup>148</sup> *Dahlab*, *supra* note 25; *Şahin*, *ibid.*, paras 111, 115.

‘others’, as noted by Judge Power in *Lautsi*, ‘[t]he display of a religious symbol does not compel or coerce an individual to do or to refrain from doing anything’.<sup>149</sup>

The ECtHR has permitted States a wide MoA to mediate a clash of rights. It would appear to be legitimate to afford States some discretion to decide the appropriate course of action in complex cases. However, the award of a MoA to States to determine the scope of grounds of limitation in conjunction with a lack of scrutiny of whether a genuine clash of rights exists gives States almost *carte blanche* to interfere with the manifestation of religion. In practice, the ECtHR’s position is incompatible with a good faith interpretation of Article 9 ECHR and has resulted in inconsistent jurisprudence regarding gender equality and proselytism.

## 5. National Authorities are Better-Placed

The ECtHR has accepted under Article 9 and Article 2 Protocol 1, that the State authorities are better-placed to make decisions in the context of planning permission;<sup>150</sup> social policy,<sup>151</sup> financial policy;<sup>152</sup> education;<sup>153</sup> hospitals;<sup>154</sup> prisons;<sup>155</sup> policing<sup>156</sup> and identity checks.<sup>157</sup> The ECtHR has accepted that many of these restrictions on individual religious freedom pursue the grounds of ‘public safety’, ‘the protection of health and morals’ or ‘the protection of the rights and

---

<sup>149</sup> *Lautsi*, *supra* note 63, Concurring Opinion of Judge Power. See also *Arslan*, *supra* note 25, para 51.

<sup>150</sup> *Johannische Kirche & Peters v. Germany*, *supra* note 28.

<sup>151</sup> *Konrad*, *supra* note 122; *Osmanoğlu and Kocabaş*, *supra* note 122, para.105; *SAS*, *supra* note 25, paras. 153-55.

<sup>152</sup> *Alujer Fernandez and Caballero Garcia v. Spain*, 14 July 2001, European Court of Human Rights, No. 53072/99; *Church Of Jesus Christ Of Latter-Day Saints v. the United Kingdom*, 4 March 2014, European Court of Human Rights, No. 7552/09, para. 33.

<sup>153</sup> *Folgerø*, *supra* note 30, para. 89; *Lautsi*, *supra* note 63, para. 69.

<sup>154</sup> *Eweida*, *supra* note 25, para. 99; *Ebrahimian*, *supra* note 25, para. 65.

<sup>155</sup> *Jakóbski*, *supra* note 26, para. 47; *Vartic*, *supra* note 26, para. 45.

<sup>156</sup> *Karahmed v. Bulgaria*, 24 February 2015, European Court of Human Rights, No. 30587/13, para. 105.

<sup>157</sup> *Mann Singh v. France*, 11 January 2009, European Court of Human Rights, No 24479/07; *El Morsli v. France*, 4 March 2008, European Court of Human Rights, No. 15585/06.

freedoms of others’.<sup>158</sup> Significant overlap can be observed between this justification for the award of the MoA and reconciling ‘a clash of rights’, as the State is often perceived by the ECtHR to be better-placed to reconcile any clash. The award of the MoA on the basis that the national authorities are better-placed results in a lack of scrutiny of the necessity of restrictions except where the State has a positive obligation to guarantee this right.

In *Chaplin*, concerning the failure of a hospital to accommodate the wearing of crucifix by a nurse, the ECtHR held, ‘[t]he hospital managers were better placed to make decisions about clinical safety than a court’.<sup>159</sup> While deference to hospital authorities appears to be appropriate, the MoA meant that the ECtHR did not consider the necessity of the restriction and, specifically, whether ‘less restrictive means’ were available to the hospital that would have satisfied the aim of the restriction whilst upholding the right of the applicant. As the issue arose as a result of a change in the design of the nurses’ uniform,<sup>160</sup> the provision of an alternative uniform does not seem to be unduly burdensome and may have allowed *Chaplin* to continue to wear the crucifix. Although this solution may not be practical it does highlight why some oversight of the necessity of the interference with religious freedom by the ECtHR is desirable.

The wide deference to States on the basis of expertise also inhibits the identification of whether the interference with Article 9 ECHR is discriminatory. In *Johannische Kirche*, on the basis of the State’s wide MoA in planning matters,<sup>161</sup> the ECtHR did not consider in whether the denial of planning permission for a place of

---

<sup>158</sup> It is worth noting that in *Church of Jesus Christ of Latter-Day Saints*, the ECtHR simply accepted that failure to provide tax exemptions to the religious community was ‘in the public interest’, without identifying the ground pursued by the interference with Article 9 ECHR. *Church Of Jesus Christ Of Latter-Day Saints*, *supra* note 152, para 35.

<sup>159</sup> *Eweida*, *supra* note 25, para. 99.

<sup>160</sup> *Ibid*, paras 19, 96.

<sup>161</sup> *Johannische Kirche*, *supra* note 28.

worship was discriminatory.<sup>162</sup> In *SAS*, the ECtHR deferred to the State on the basis of the democratic decision-making process, despite acknowledging that ‘Islamophobic remarks marked the debate which preceded the adoption of the Law’.<sup>163</sup> The MoA permitted on the basis of democracy combined with the alleged ‘lack of concrete consensus’ resulted in an almost complete lack of scrutiny of the necessity of the ‘*burqa* ban’. Yet, the Islamophobic nature of the debate highlighted the very deficiencies inherent in democratic decision-making that the Convention and ECtHR is supposed to guard against. The MoA has the potential to allow States an unchecked discretion to restrict religious freedom in cases concerning politically sensitive issues, without oversight of the motivations underpinning these limitations.

The ECtHR has, nonetheless, adopted a narrower MoA in Article 9 ECHR cases if the State has failed to comply with its positive obligation to secure the rights contained in the Convention.<sup>164</sup> Thus, although in *Karaahmed* the ECtHR accepted that the State had a wide MoA in relation to ‘operational matters’ pertaining to policing, the failure of the police to prevent demonstrators from interfering with religious worship meant that the State had not struck an appropriate balance between the rights of protesters and Article 9 ECHR.<sup>165</sup> Similarly, the State has a positive obligation to ensure that prisoners are able to observe religious requirements whilst incarcerated. In this respect the ECtHR has examined whether the prison authorities have struck a fair balance between the religious freedom of the applicant and other competing interests, including the rights of other prisoners.<sup>166</sup> Thus, despite recognizing the MoA left to the prison authorities in these cases, the existence of a

---

<sup>162</sup> Berry, *supra* note 4, p. 24.

<sup>163</sup> *SAS*, *supra* note 25, para. 149.

<sup>164</sup> *Jakóbski*, *supra* note 26, para. 46; *Karaahmed*, *supra* note 156, para. 111.

<sup>165</sup> *Karaahmed*, *ibid*, paras. 105, 111.

<sup>166</sup> *Jakóbski*, *supra* note 26, para 54; *Vartic*, *supra* note 26, para 54. Cf. *Kovaļkovs*, *supra* note 27, para 66.

positive obligation seems to result in the ECtHR exercising a higher level of scrutiny of the necessity of the interference with the applicant's rights.

The ECtHR has permitted States a wide MoA in cases where the authorities are deemed to be better-placed to determine the appropriate course of action. The MoA in this respect is directly linked to democratic legitimacy and the perceived expertise of national authorities. However, the lack of scrutiny of the justifications for the interference with Article 9 ECHR by the ECtHR, means that it is not able to identify whether 'less restrictive means' were available or if 'hostile-external preferences'<sup>167</sup> were at play. As warned by Benvenisti, in these cases, the MoA 'reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses'.<sup>168</sup>

## 6. Conclusion

While the award of the MoA to States by the ECtHR in cases concerning freedom of religion or belief is not inherently problematic, in practice, it gives significant cause for concern. Deference to States in cases disclosing a clash of rights or where the national authorities are better-placed to make a decision appears to be justifiable. In contrast, in cases concerning an alleged lack of consensus, the basis of deference is often inappropriate or applied inconsistently, which in turn, undermines a good faith interpretation of the right and legal certainty. Once granted, the MoA appears to either be superfluous or go hand in hand with an almost complete lack of scrutiny of the State's position. This lack of scrutiny is particularly problematic when the ECtHR allows States to determine both the scope of grounds of limitation and the appropriate

---

<sup>167</sup> Letsas, *supra* note 19, p. p. 729.

<sup>168</sup> Benvenisti, *supra* note 23, p. 853.

course of action. Rather than affording priority to the right to manifest religion, the ECtHR has, through the MoA, uncritically prioritized the State's justification for limiting this right.

The approach of the ECtHR has also led to apparent inconsistencies within its jurisprudence. While this can be rationalized in relation to the differential treatment of secular traditions as compared to Christian and Islamic traditions, it is not as easy to explain in cases concerning proselytism and gender equality. These inconsistencies are particularly problematic from the perspective of the rule of law and legal certainty. Further, it must be noted that these discrepancies primarily result in a reading down of the rights of those adhering to minority faiths and, worryingly, do not probe for discriminatory motives. As a result, the breadth of the MoA in the majority of cases concerning religious freedom is incompatible with the role of the ECtHR as 'the conscience of Europe'.<sup>169</sup>

---

<sup>169</sup> Statement of Lynn Ungood-Thomas (United Kingdom) at Consultative Assembly 1<sup>st</sup> Session in Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights Volume 2: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly 10 August-18 November 1949* (The Hague: Martinus Nijhoff, 1975) p 174.